STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 19, 2006
v	No. 260644 Oakland Circuit Court
KEVIN MICHAEL ROBERTS, Defendant-Appellant.	LC No. 2003-191595-FH

Before: Davis, P.J., and Murphy and Schuette, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of child sexually abusive activity, MCL 750.145c(2), and use of a computer to commit a crime, MCL 750.145d(2)(f). He was sentenced to concurrent prison terms of 3 to 20 years for each conviction. Defendant appeals as of right. We affirm.

I. Underlying Facts

In August 2002, the 15-year-old male victim's parents learned that he had been having sexually explicit conversations via the Internet with an adult male, later identified as 43-year-old defendant. The communications were described as adult, sexual, and graphic in nature. The communications included defendant asking the victim what time he got out of school, whether they could "hook up," and what time his parents arrived home. The communications also described what they would do when they "hooked up" in graphic detail, and included the exchange of personal information. In one online chat, defendant asked the victim if he "had ever been with anyone yet?" The victim replied, "Nope." The police eventually became involved, and an officer posed as the 15-year-old victim. After a brief online conversation, defendant asked if they were "ever going to get together?" Eventually, a meeting was arranged. Defendant described what they would do during the meeting in sexually explicit detail, suggested a sexual website, and provided a password for the site. Defendant also described the kind of car he drove, and asked that the victim bring "protection" to their meeting. Defendant was arrested at the site where he had arranged to meet the 15-year-old victim. Upon searching defendant, the police found three condoms.

II. Sufficiency of the Evidence

Defendant claims that, because MCL 750.145c is limited to conduct involving "the production or attempts to produce child pornography," the evidence was insufficient to sustain his convictions of child sexually abusive activity. We disagree.

When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

Contrary to what defendant argues, the statute is not limited to criminalizing conduct involving the production of child sexually abusive material. Among the conduct expressly proscribed by former MCL 750.145c(2) is "arrang[ing] for . . . any child sexually abusive *activity or* child sexually abusive *material*," or attempting, preparing or conspiring to arrange for any child sexually abusive activity.[1] (Emphasis added.) Former MCL 750.145c(1)(h) [now MCL 750.145c(1)(l)] defined "[c]hild sexually abusive activity" as "a child engaging in a listed sexual act." "'Child' means a person who is less than 18 years of age[.]" MCL 750.145c(1)(a) [now MCL 750.145c(1)(b)]. A listed sexual act was defined to include "sexual intercourse, erotic fondling, sadomasochistic abuse, masturbation, passive sexual involvement, sexual excitement, or erotic nudity." MCL 750.145c(1)(e) [now MCL 750.145c(1)(h)]. The statute provided a separate definition for "child sexually abusive material." MCL 750.145c(1)(j) [now see MCL 750.145c(1)(m)]. In a published, binding case recently decided, which is directly on point, this Court rejected the exact same argument presented here. *People v Adkins*, __ Mich App __; __ NW2d __ (Docket No. 260451, issued August 10, 2006). Accordingly, defendant's claim that the evidence was insufficient because he did not produce pornography is without merit, and there was more than sufficient evidence establishing defendant's guilt under the statute.[2]

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[1] The statute was amended by 2002 PA 629, effective March 31, 2003, and subsequently amended again by 2004 PA 478, effective December 28, 2004.

[2] Within this issue, defendant argues that the prosecutor should have charged him with the lesser offense of attempted solicitation of a minor for immoral acts, MCL 750.145a. "[T]he decision whether to bring a charge and what charge to bring lies in the discretion of the prosecutor." *People v Venticinque*, 459 Mich 90, 100; 586 NW2d 732 (1998). The prosecutor has broad discretion to bring any charge supported by the evidence. *People v Nichols*, 262 Mich App 408, 415; 686 NW2d 502 (2004). A prosecutor abuses his discretion "only if a choice is made for reasons that are 'unconstitutional, illegal, or ultra vires.'" *People v Barksdale*, 219 Mich App 484, 488; 556 NW2d 521 (1996)(citation omitted). Defendant does not offer any information or evidence suggesting that the charge was brought for an unconstitutional, illegal, or illegitimate reason. Thus, there is no basis for this Court to conclude that the prosecutor abused his power in charging defendant with child sexually abusive activity.

III. Jury Questions

Next, defendant asserts that the trial court violated his due process right to an impartial jury by permitting the jurors to submit questions for witnesses during the trial. We disagree.

Because defendant did not object to either the court's instruction that allowed the jurors to ask questions,[3] or any specific questions submitted by the jury, this issue is unpreserved. Accordingly, we review the issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764, 763-764; 597 NW2d 130 (1999).

In *People v Heard*, 388 Mich 182, 187; 200 NW2d 73 (1972), our Supreme Court held that "[t]he practice of permitting questions to witnesses propounded by jurors should rest in the sound discretion of the trial court." Despite defendant's assertion that "[a]s a matter of law reform, this practice should stop," this Court is bound by the Supreme Court's decision in *Heard*. See *Boyd v W G Wade Shows*, 443 Mich 515, 523; 505 NW2d 544 (1993). Because the trial court had the discretion to allow the jurors to submit questions, *Heard*, *supra*; *People v Stout*, 116 Mich App 726, 733; 323 NW2d 532 (1982); see also CJI2d 2.9, and a review of the questions presented reveals that they do not reflect juror bias or prejudice, defendant has not shown plain error.

IV. Sentence

We reject defendant's claim that the trial court improperly scored 15 points for offense variable (OV) 10 (exploitation of a vulnerable victim), MCL 777.40, of the sentencing guidelines. "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). A scoring decision for which there is any supporting evidence will be upheld. *Id.*

MCL 777.40(1)(a) directs a score of 15 points if "[p]redatory conduct was involved." "Predatory conduct" is defined as "preoffense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(3)(a). Here, there was evidence that, before the police became involved, the victim informed defendant that he was only 15 years old. Defendant continued to communicate with the child via the Internet and telephone, and had several exchanges with the child. In the online chats, defendant inquired whether the victim had "been with anyone yet," and conversed in explicit sexual and graphic terms. Defendant later arranged a meeting with whom he believed was the 15-year-old child to act on the discussed sexual acts. Before the meeting, defendant directed the victim to a pornographic website, and provided a password for him to gain access. Defendant thereafter drove to the agreed meeting location to

[3] During trial, the trial court instructed the jurors that they may submit questions in writing at the conclusion of attorney questioning of each witness. The trial court indicated to the jurors that it would review each question for compliance with evidentiary rules before it asked the witness the question.

meet the victim. Under these circumstances, the trial court did not abuse its discretion by assessing 15 points for OV 10. See *People v Kimble*, 252 Mich App 269, 274-275; 651 NW2d 798 (2002), aff'd 470 Mich 305 (2003).[4] Accordingly, defendant is not entitled to resentencing on this basis.

We also reject defendant's final claim that resentencing is warranted because the trial court should have departed below the statutory sentencing guidelines range of 30 to 50 months.[5] Defendant's sentences of 3 to 20 years are within the applicable guidelines range. This Court must affirm a sentence within the applicable guidelines range absent an error in the scoring of the guidelines or reliance on inaccurate information in determining the sentence. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004). On appeal, defendant has not demonstrated that the guidelines were erroneously scored or that the trial court relied on inaccurate information in determining his sentence. Therefore, we must affirm defendant's sentences.

Affirmed.

/s/ Alton T. Davis
/s/ William B. Murphy
/s/ Bill Schuette

[4] In *Kimble*, this Court affirmed a trial court's finding of predatory conduct where the evidence indicated that the defendant drove around looking for a victim for about an hour and followed the victim home for the purpose of committing a crime.

[5] In arguing for a downward departure, defendant relied on his age, lack of a prior criminal record, employment history, lack of drug or alcohol abuse, and lack of social and psychological issues.